Supreme Court, U.S.
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No. 97-303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUMANA INC., and
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Petitioners,

v.

MARY FORSYTH, MARIETTA CADE,
WILLIE ANDREWS, MARY LOU BUEHLER,
HELEN STAVES, RANDOLPH BRATTON,
AND SEARLE AUTO GLASS, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 15.6 of this Court, petitioners Humana Inc. and Humana Health Insurance of Nevada, Inc. submit this brief in reply to Respondents' Opposition To Humana's Petition For Writ of Certiorari ("Opposition").

I. RESPONDENTS' ARGUMENT IN SUPPORT OF THE DECISION BELOW FURTHER ILLUSTRATES THE NEED FOR REVIEW BY THIS COURT.

As is detailed in the Petition for Writ of Certiorari herein, there currently exists a conflict among the circuits respecting the interpretation of the McCarran-Ferguson Act that requires this Court's review and resolution. In their Opposition, Respondents do not contest -- indeed, could not contest -- the existence of the conflict. Respondents attempt to minimize the significance of that conflict, however, by dismissing the circuit court decisions at odds with the decision below here as "spring[ing] solely from a recent misinterpretation of precedent by the Sixth and Eighth Circuits." Opposition at p.5. In particular, respondents urge that the Eighth and Sixth Circuits have failed to apply properly the principles governing federal preemption of state law. Quoting this Court's formulation of the test for implied federal preemption found in *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984), respondents argue that the decisions of the Sixth and Eighth Circuits do not comport with that test and are, therefore, wrong.

Respondents' argument does not, of course, actually address the question now before this Court: Is there a conflict among the circuits worthy of this Court's time to resolve? Whether it is the Ninth Circuit that is right -- as respondents urge -- or the Sixth and Eighth Circuits -- as petitioners have argued -- is not particularly germane. What is of significance at this stage is the fact that the circuits disagree, regardless of which have it right.

Respondents' argument does, however, point to the depth of the underlying philosophical differences between the circuits that have led to the present conflict. In urging that the Sixth and Eighth Circuits erred in not following the precedents that govern issues of implied federal preemption, respondents necessarily indulge in the threshold presumption that McCarran-Ferguson preemption is to be limited by the same rigorous tests that govern implied federal preemption. The Ninth Circuit and the Seventh Circuit both appear to subcribe to that philosophy, reasoning that the McCarran-Ferguson Act establishes a form of *inverse* preemption of federal law analogous to federal preemption of state law. *See Merchants Home Delivery Serv. Inc. v. Frank B. Hall & Co., Inc.*, 50 F.3d 1486, 1492 (9th Cir.), *cert. denied* ___ U.S. ___, 116 S.Ct. 418 (1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 296 (7th Cir. 1992), *cert. denied* 508 U.S. 907 (1993).

If one does not accept that threshold presumption, the justification for the narrow view of McCarran-Ferguson preemption espoused by the Ninth and Seventh Circuits largely evaporates, and the more flexible analysis favored by the Eighth and Sixth Circuits recommends itself. A key to the differences between the circuits, therefore, is whether the analogy between McCarran-Ferguson and implied federal preemption is as perfect as the Ninth and Seventh Circuits appear to believe. It is not.

The narrow scope of implied federal preemption derives from constitutional notions of federalism. As this Court observed in *Cipallone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), any assertion of federal

preemption must overcome the strong presumption that Congress did not intend to supersede the historic police powers of the states. No such considerations are present in a McCarran-Ferguson analysis. The McCarran-Ferguson Act does not involve the interference by the federal government in the sovereignty of the states. Rather, it is an express, voluntary relinquishment of power by the federal government. There is no jurisprudential principle that requires that this act of Congress be governed by any rules other than the ordinary principles of statutory construction.

The conflict among the circuits is not attributable to errors in following precedent, as respondents would have it. The conflict reflects a fundamental difference in approach to McCarran-Ferguson, a difference that determines what precedent applies and what does not. The need to resolve that fundamental difference compels review by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

September 26, 1997

Respectfully submitted

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